

KEVIN D. ELLIS
SYLVIA D. ELLIS

IBLA 76-280

Decided May 3, 1976

Appeal from decisions of the Idaho State Office, Bureau of Land Management, rejecting desert land applications I-9076 and I-9077.

Set aside and remanded.

1. Act of August 18, 1894 (Carey Act) -- Act of March 15, 1910 --
Applications and Entries: Generally -- Desert Land Entry:
Applications -- Desert Land Entry: Lands Subject to -- Regulations:
Applicability -- Regulations: Force and Effect as Law -- Segregation:
Filing of Applications -- Withdrawals and Reservations: Temporary
Withdrawals

It is improper for the Bureau of Land Management to reject desert land applications on the basis of directives within a deleted regulation which required that such applications be rejected when the lands described therein were included within a previously filed state application for a temporary withdrawal under the Act of March 15, 1910, which permits the Secretary to temporarily withdraw lands in furtherance of the purposes of the Carey Act. In the absence of a recodification of the directives in the deleted regulation, the Bureau should suspend action on all applications filed subsequent to the withdrawal application pending final action on the application for withdrawal.

APPEARANCES: Kevin D. Ellis and Sylvia D. Ellis, each pro se.

OPINION BY ADMINISTRATIVE JUDGE RITVO

Kevin D. Ellis and Sylvia D. Ellis have appealed from separate decisions of the Idaho State Office, Bureau of Land Management (BLM), rejecting their respective desert land applications I-9076 and I-9077, each for 320 acres of national resource lands in secs. 1 and 12, T. 8 S., R. 10 E., B.M., Idaho. Appellants' desert land applications were filed on December 2, 1974. Prior to that date, on November 21, 1974, the Department of Water Resources, State of Idaho, filed an application for a temporary withdrawal pursuant to the Act of March 15, 1910, 43 U.S.C. § 643 (1970). This Act authorizes the Secretary to temporarily withdraw lands upon application by a state to aid in carrying out the purposes of the Carey Act of August 18, 1894, as amended, 43 U.S.C. § 641 et seq. (1970).

In both decisions the State Office provided the following basis for its rejection of appellants' applications:

The regulation appearing in 43 CFR 2222.6-2(e) directs that applications for temporary withdrawal under the Amendatory Act of March 15, 1910, will be noted to the records and the authorized officer "will thereafter reject all applications to enter, purchase, or select any of such lands, excepting when settlement or applications to enter, purchase, or select prior to the date of filing of the State's application is alleged or disclosed of record."

The State's application was filed prior to the filing date of the desert land applications. Therefore in accordance with the above cited regulation, the desert land applications * * * are hereby rejected.

In their statement of reasons on appeal, the appellants generally object to the BLM decisions and urge that the land applied for is suitable for desert land entry.

[1] The Board concludes that the decisions below must be set aside and the cases remanded because the State Office failed to provide a proper basis for rejection of the desert land applications. The regulation relied upon by the State Office was deleted from Title 43 of the Code of Federal Regulations. 35 F.R. 3072 (1970); see Idaho Department of Water Resources, 21 IBLA 210, 212 n. 1 (1975). 1/ The directives within the deleted regulation were

1/ The regulations under the Carey Act and the Act of March 15, 1910, were last published in 43 CFR 2222.6 (1970).

not thereafter included within any newly codified regulations. The BLM, Washington, D.C., has informed the Board that the deleted Carey Act and Act of March 15, 1910, regulations are being revised and will be recodified in the near future. In the meantime, there is no specific regulatory requirement mandating rejection of applications following receipt of a state's temporary withdrawal application under the Act of March 15, 1910. Cf. Phillips Petroleum Co., 61 I.D. 93, 100-01 (1953). 2/

Despite the absence of an existing replacement for the deleted regulation, the BLM is not without guidance respecting procedures for handling matters such as this one. Regulation 43 CFR 2351.3(a), which is concerned with the effect of an application for a withdrawal filed by a federal agency, states in part the following:

The noting of the receipt of the application [for withdrawal] * * * shall temporarily segregate such lands as provided in § 2091.2-5.

Regulation 43 CFR 2091.2-5(a) provides that:

The noting of the receipt of the application under §§ 2351.1 to 2351.6 * * * shall temporarily segregate such lands from settlement, location, sale, selection, entry, lease, and other forms of disposal under the public land laws, including the mining and the mineral leasing laws, to the extent that the withdrawal or reservation applied for, if effected, would prevent such forms of disposal. To that extent, action on all prior applications the allowance of which is discretionary, and on all subsequent applications, respecting such lands will be suspended until final action on the application for withdrawal or reservation has been taken. * * *
[Emphasis added.]

Upon inquiry to the Idaho State Office, the Board was informed that the State of Idaho's application for a temporary withdrawal had not been accepted and was still under consideration by the BLM. In the absence of a specific regulation governing the effect of such an application, we believe the BLM should be guided by the policy

2/ Compare Tom B. Boston, 6 IBLA 269 (1972), where the prior regulation 43 CFR 2013.2-4 (1970), was embodied within a new regulation 43 CFR 2091.2-3, which provides that the filing of an application for a state exchange segregates the selected lands from the filing of subsequent applications, the allowance of which is discretionary, and requires rejection of such applications. See also 43 CFR 2627.4(b).

expressed in the cited regulation. ^{3/} Therefore, appellants' applications should be suspended pending final action on the State's request for a withdrawal. In the event the State's application for withdrawal is accepted, rejection of appellants' desert land applications would then be proper either pursuant to the guidelines expressed in 43 CFR 2091.1(a), or in conformance with newly recodified regulations which may directly address this matter. Cf. Edith O. Fisher, 17 IBLA 258 (1974); William F. Ringert, 12 IBLA 378 (1973).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions below are set aside and the cases remanded for action consistent with the views expressed herein.

Martin Ritvo
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Frederick Fishman
Administrative Judge

^{3/} Without regulatory notice being given to an applicant regarding the futility of developing and submitting an application for entry covering lands previously applied for under the Act of March 15, 1910, we do not believe it equitable to follow procedures for rejection rather than suspension of the later filed application.

